

Legrand (Migration) [2020] AATA 5396 (28 October 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Louis Benito Mervyn Legrand
CASE NUMBER:	1817586
HOME AFFAIRS REFERENCE(S):	BCC2017/2627817
MEMBER:	P. Maishman
DATE:	28 October 2020
PLACE OF DECISION:	Perth
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 28 October 2020 at 1:12pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – child of the relationship – relationship with sponsor ceased – new relationship and child – no jointly owned assets or liabilities – couple were not living together from before application date – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2, cl 820.211; r 1.09

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. Mr Legrand applied for the visa on 24 July 2017 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis Mr Legrand did not satisfy cl.820.211(2) because the delegate was not satisfied Mr Legrand was the spouse or de facto partner of Ms Mitchell at the time of application.
4. Mr Legrand appeared before the Tribunal on 10 March 2020 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Victor Newman.
5. Mr Legrand was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The Tribunal had before it a copy of the Department's file containing the visa application, sponsorship form and evidence referred to by the delegate. Mr Legrand's visa application was submitted on 24 July 2017. A sponsorship form in Ms Mitchell's name was submitted on 6 October 2017 by the applicant's representative in Perth. Mr Legrand was previously married and claims that relationship ended on 5 November 2015. A divorce order confirms his marriage was terminated by divorce with effect from 26 August 2017. The parties claim they first met in person on 13 November 2015 and committed to a shared life together to the exclusion of all others on 19 November 2015. Mr Legrand provided a statutory declaration signed on 7 May 2018 declaring his relationship with the sponsor ended on 30 November 2017 but he was advised he remained eligible for the visa because he and the sponsor had a child together. The Department received a birth certificate recording Mr Legrand as the father and the sponsor as the mother of a child born November 2017.
8. Mr Legrand gave the Tribunal a copy of the delegate's decision record. The delegate's decision record summarises his visa history. Mr Legrand arrived in Australia as the holder of a student visa in September 2009. He was granted a further visa in August 2013 as the dependent spouse of a party not related to this application. That visa was valid to 15 March 2018.
9. Mr Legrand gave the Tribunal additional documents on 24 August 2018 in the form of a groceries receipt; an extract from his ANZ bank account; and a flight boarding pass in the sponsor's name dated 31 July 2017. Mr Legrand gave the Tribunal further evidence on 29 August 2018 including further extracts from his ANZ bank account; a copy of his Myer One statement; an itinerary for the sponsor's flight on 9 March 2018; a medical report in the

sponsor's name dated 22 March 2016; and an invoice from Peninsula Hot Springs on 24 August 2017.

10. The Tribunal allowed extra time after the hearing to receive submissions and evidence to address concerns identified at hearing. The Tribunal received a submission dated 24 March 2020; an email from Mr Legrand's email address containing the sponsor's resume; a statutory declaration from Elizabeth Neale dated 18 March 2020; a number of utility invoices in the sponsor's name (annexure b); a layby receipt from a baby products supplier (annexure c); a number of emails between the applicant and sponsor (annexure d); four photographs (annexure e); correspondence between Mr Legrand and family lawyers (annexure f); and a form signed by the sponsor on 28 May 2017 appointing the migration agent, migration agent costs agreement signed by Mr Legrand and the sponsor on 9 October 2016 and an unfiled statutory declaration signed by the sponsor on 30 May 2017 (annexure g).
11. The issue in the present case is whether the applicant was, at the time of application, the spouse or de facto partner of the sponsor.

Whether the parties are in a spouse or de facto relationship

12. Clause 820.211(2)(a) requires that at the time the visa application was made the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen.
13. In the present case Mr Legrand claims to be the de facto partner of the sponsor at the time of application.
14. The Department's file contains a copy of the sponsor's passport and the Tribunal accepts she is an Australian citizen.

Were the parties in a de facto relationship at the time of application?

15. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
16. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
17. Mr Legrand gave oral evidence to the Tribunal. Mr Legrand told the Tribunal about the commencement and development of his relationship with the sponsor. Mr Legrand told the Tribunal the sponsor left Perth for Melbourne on 31 July 2017 and gave birth to their child in mid-November 2017. He said his relationship with the sponsor ceased on 30 November 2017. Mr Legrand gave evidence he commenced a new relationship with a woman from Mauritius in January 2018 and has a child from that relationship born 21 May 2019.
18. The Tribunal considered the evidence in relation to the financial aspects of Mr Legrand's relationship at the time of application, including; whether he and the sponsor jointly own assets or have joint liabilities; the extent of any pooling of financial resources and any

sharing of day-to-day household expenses; and whether either party owes a legal obligation in respect of the other.

19. Mr Legrand and the sponsor held a CSB joint account **7292. The account statement held on the Department's file shows the account was opened on 21 December 2015. There are no transactions on the statement provided. The Tribunal attributes no weight to the document as evidence of a financial relationship demonstrating a de facto relationship between Mr Legrand and the sponsor.
20. An ANZ statement number 53 for the period 2 September 2016 to 4 January 2017 for account *0437 held on the Department's file does not show transactions around the date of the visa application. The Tribunal attributes no weight to the document as demonstrative of Mr Legrand's and the sponsor's relationship at the time of application.
21. The ANZ statements numbered 19 to 25 for account *9042 show transactions for the period 10 August 2016 to 10 October 2017. The account is in the joint names of an unrelated third party and Mr Legrand ATF The Trustee for Northseven Trust. Various transactions on the account are annotated and highlighted in handwriting for example 'Deborah' and 'rent'. The Tribunal suggested the account is a business operating account. Mr Legrand acknowledged transactions on the account show payments to several individuals unrelated to this application. Mr Legrand denied the other people were in a relationship with him or that the sponsor was his employee. The Tribunal was provided with a list of transactions from 24 August 2017 to 30 August 2017 showing transactions in Melbourne during a period he visited the sponsor. A further list for 5 January 2018 to 17 August 2018 shows payments to Anytime Fitness. The Tribunal acknowledges some transactions appear to show Mr Legrand pays some bills, such as RAC and gym membership, for the sponsor. The Tribunal however is concerned the account essentially belongs to a third party held by Mr Legrand and another party as trustees of that entity. The Tribunal does not consider the account is demonstrative of a pooling of financial resources or sharing of household expenses between Mr Legrand and the sponsor at the time of application.
22. A Myer loyalty transaction statement in Mr Legrand's name shows purchases linked to the loyalty program between May and August 2017. A copy of an online supermarket order history shows the sponsor purchased some groceries in Victoria in August 2018. The Tribunal attributes little weight to the statement as demonstrative of a financial relationship between the parties. The documents do not identify for whom or by whom the purchases were made.
23. Mr Legrand told the Tribunal the sponsor was receiving Centrelink payments. He recalls attending a job centre with the sponsor and her being told she needed to declare him to Centrelink. He claims to have told her to correct records at Centrelink or he would end up paying them back.
24. Mr Legrand and the sponsor do not jointly own assets or have joint liabilities. They do not pool financial resources or share day-to-day household expenses. The financial aspects of Mr Legrand's and the sponsor's relationship are not demonstrative of a couple who, at the time of application, have been in a genuine de facto relationship for more than 18 months.
25. The Tribunal considered the nature of the household including joint responsibility and care for children, the parties' living arrangements and the sharing of housework.
26. Documents on file indicate the sponsor and Mr Legrand receive correspondence at the address leased by Mr Legrand between August 2016 and August 2017. A boarding pass provided to the Tribunal shows the sponsor flew to Melbourne on 31 July 2017. Mr Legrand

claims his relationship with the sponsor continued until November 2017, after the birth of their child. Mr Legrand told Tribunal he did the dishes and they shared the cooking.

27. The Tribunal attributes neutral weight to the evidence of the nature of Mr Legrand's and the sponsor's household as demonstrative of a genuine de facto relationship.
28. The Tribunal considered the social aspects of Mr Legrand and the sponsor's relationship.
29. Mr Newman gave oral evidence he visited Mr Legrand and the sponsor on weekends and that he went jogging with Mr Legrand. Mr Newman gave evidence Mr Legrand and the sponsor moved addresses in 2016 and he considered them to be a genuine couple.
30. Mr Legrand provided the Tribunal with a statutory declaration from Mrs Elizabeth Neale signed 18 March 2020. Mrs Neale describes herself as being the sponsor's foster mother. Mrs Neale says the sponsor stayed with her in Victoria early in her pregnancy for about three months before returning to Western Australia.
31. Mr Legrand gave oral evidence that he had met the sponsor's mother and foster mother. He has not met the sponsor's friends and when they travel to Melbourne he spends the time travelling, eating and looking after the sponsor's dog. They had planned to bring the dog to Western Australia but lived in a unit and could not break the lease to accommodate the dog.
32. There is minimal supporting evidence to show the parties represent themselves to other people as being in a de facto relationship with each other. The Tribunal gives some weight to the declarations of Mr Newman and Mrs Neale that the parties were in a relationship at some time. The Tribunal attributes neutral weight to the social aspects of Mr Legrand and the sponsor's relationship as being indicative of a couple in a de facto relationship.
33. The Tribunal considered the nature of Mr Legrand's and the sponsor's commitment to each other.
34. Mrs Neale's statutory declaration indicates the sponsor resided in Melbourne with her for three months early in her pregnancy. The sponsor sent Mr Legrand an email on 3 April 2017 with the subject line saying "I love you lots". A subsequent email on 8 April 2017 indicates the sponsor was booking into antenatal classes at the Royal Women's Hospital (Melbourne). Mr Legrand has given evidence the sponsor went to Melbourne on 31 July 2017 and did not return to Perth. Mr Legrand claims to have visited the sponsor in August and October 2017 and twice in November 2017 and to have been present at the birth of their child on 14 November 2017.
35. There is little probable evidence supporting Mr Legrand's claim to have been in a committed relationship with the sponsor at the time of application. The evidence suggests the sponsor went to Melbourne early in her pregnancy and stayed there for three months. She returned to Perth until 31 July 2017 when she returned to Melbourne and did not come back to reside with Mr Legrand in Western Australia.
36. Mr Legrand told the Tribunal he started dating another woman in January 2018. He first met her on a Christian dating forum in 2015 prior to meeting the sponsor. Their relationship did not progress until after the split up from the sponsor. She lives in Mauritius and he had a child with her in May 2019. Mr Legrand says he started building a house in Mauritius in 2016, it is now furnished but remains empty. Mr Legrand denies he built the house for his Mauritian partner.
37. The Tribunal is not satisfied Mr Legrand and the sponsor's commitment to each other is mutual. The sponsor was in Melbourne for the first three months and the last four months of

her pregnancy. Mr Legrand remained in Western Australia other than for periodic short visits. The Tribunal attributes little weight on the commitment of Mr Legrand and the sponsor to each other as an indication that they were in a de facto relationship at the time of application.

38. The Tribunal was concerned the sponsor was not aware she had sponsored the applicant for his partner visa. The sponsor left Western Australia on 31 July 2017, a week after the visa application was lodged electronically on 24 July 2017. The sponsorship form was lodged electronically on 6 October 2017 by the parties' Western Australia based migration agent. A copy of the sponsor's passport was taken and certified as being a true copy of the original document on 26 September 2017. There was no evidence before the Tribunal from the sponsor about the nature of her relationship with Mr Legrand.
39. After the hearing the Tribunal received a submission from the applicant's migration agent. The applicant and sponsor engaged the migration agent on 9 October 2016. The Tribunal accepts the sponsor appointed the migration agent to provide assistance with a partner visa application on 28 May 2017. A statutory declaration signed by the sponsor 28 May 2017 was not put to the Department as it was incomplete. The migration agent declares the sponsor's original passport was provided by Mr Legrand for copying.
40. The Tribunal is not satisfied that Mr Legrand and the sponsor were in a genuine and continuing relationship at the time of application. On the evidence the sponsor spent three months away from Mr Legrand when she went to Melbourne early in her pregnancy. The sponsor's incomplete statutory declaration and appointment of a migration agent on 28 May 2017 indicates she was in Western Australia in late May 2017, however she returned to Victoria two months later, a week after Mr Legrand made his visa application and has not returned to live with Mr Legrand. The Tribunal acknowledges Mr Legrand's claim his relationship with the sponsor ceased after their child was born.
41. The Tribunal has had regard to all the evidence and is not persuaded Mr Legrand's relationship with the sponsor developed to a point where there was a mutual commitment to a shared life to the exclusion of all others. The Tribunal is not satisfied the relationship was considered by the parties' as genuine and continuing or that they lived together at the time of application.
42. On the basis of the above the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time the visa application was made.
43. Therefore the applicant does not meet cl.820.211(2)(a).
44. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

45. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

P. Maishman
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).